In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-756

C. O. HANSON,
Petitioner,

vs.

SHELL OIL COMPANY,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, C. O. Hanson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 3, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The District Court wrote no opinion and trial was had by jury. The District Court's judgment is attached as Appendix B.

JURISDICTION

The Court of Appeals entered judgment on September 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1) Whether the Court of Appeals usurped the function of the jury by reviewing the evidence to conclude that a jury instruction contrary to this Court's opinion in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971), was harmless error.

2) Whether the Court of Appeals has adopted a rule of law regarding the statute of limitations for unascertainable damage which is contrary to the law in other circuits and contrary to this Court's opinion in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable constitutional and statutory provisions are set out in Appendix C.

STATEMENT OF THE CASE

Proceedings In The District Court

This action was filed on December 23, 1968, by the petitioner herein, C. O. Hanson ("Hanson"), the

former owner of 17 independent gasoline stations and a wholesale distribution business in Tucson, Arizona, against Shell Oil Company, Standard Oil Company of California, and Gulf Oil Corporation. (R. 1)[1]

At the conclusion of pretrial proceedings the District Court, on July 27, 1970, granted a motion for partial summary judgment in favor of defendants Shell Oil Company and Standard Oil Company of California as to (a) violations of §7 of the Clayton Act, 15 U.S.C. §18 and (b) all violations of the antitrust laws occurring prior to December 23, 1964. (R. 81-82) Partial summary judgment was also granted in favor of defendant Gulf Oil Corporation as to (a) all antitrust violations occurring prior to December 23, 1964 (R. 78-79) and (b) violations of §7 of the Clayton Act, 15 U.S.C. §18, resulting from Gulf's acquisition of Wilshire Oil Company of California. (R. 91)

On November 3, 1970, a trial commenced before a jury, on plaintiff's claims under §§1 and 2 of the Sherman Act. (R. 94, 1228) The trial consumed 31 trial days and covered over 6,500 transcript pages. At the close of the evidence, defendants Shell, Standard and Gulf moved for directed verdicts. The motions were granted in their entirety as to Gulf. The motions of Shell and Standard were granted as to Hanson's claims of unilateral attempt to monopolize and as to

[1] As used herein, R.=Record on Appeal; Tr.=Transcript; PX=Plaintiff's Exhibit; SX=Shell Exhibit; StdX=Standard Exhibit; and App.=Appendix to this Petition For Writ of Certiorari. Whether the first or second trial is referred to can be determined by I=First Trial and II=Second Trial.

Hanson's charges that Shell and Standard conspired with or coerced their dealers to agree to fix the retail prices at which their dealers sold gasoline. (Tr.I 5915-16)

The District Court overruled the balance of the motions of Shell and Standard and submitted to the jury Hanson's claims (1) that Shell and Standard conspired to fix the prices at which they sold gasoline to their dealers in Tucson and (2) that Shell and Standard conspired to monopolize motor fuel in Tucson. (Tr.I 5916, 6477-599)

On January 11, 1971, after 8 days of deliberation (R. 1288-95), the jury returned a verdict in favor of Hanson and against defendants and awarded Hanson damages in the sum of $363,181.31. (R. 1295, 291) Defendants Shell and Standard then moved to set aside the jury's verdict and enter judgment notwithstanding the verdict or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59. (Tr. Verdict pp. 4-7)

On February 19, 1971, the District Court denied the motions for judgment notwithstanding the verdict but granted the motions of Shell and Standard for a new trial. (Tr. 2/19/71 p. 37)

Thereafter Hanson settled his claims with Standard (R. 991-92) and on October 19, 1972, a second jury trial commenced. At the close of the evidence in the second trial, Hanson requested a jury instruction reciting the rule of law as announced in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321

(1971), that an overt act in furtherance of the conspiracy was not necessary within the limitations period. (Tr.II 3895) The District Court rejected Hanson's request (Tr.II 3894-96), and the jury was charged over objection, as follows:

> "You have heard throughout the trial the references to the date December 23, 1964. That date is important to this lawsuit because Plaintiff may recover damages only if you find the Defendant committed overt acts in violation of the antitrust laws after December 23, 1964, and if those acts injured the Plaintiff. I have permitted you to hear evidence as to other matters before December 23, 1964, but such evidence was admitted only as background material which the Plaintiff was permitted to produce for the purpose of attempting to show the origins of alleged conduct which Plaintiff charages occurred after December 23, 1964." (Tr.II 4314; App. A pp. xviii-xix)

The District Court's instruction embodied the proposed instruction submitted by defendant Shell. (Tr.II 1138)

The resulting prejudice to Hanson's right of recovery was compounded by additional erroneous jury charges which directed that Hanson failed in his proof if the jury found the asserted injury-producing antitrust violations had occurred prior to December 23, 1964. The jury was charged, over objection (Tr.II 1134), as follows:

> "In this action the Plaintiff has charged the Defendant violated various antitrust laws. If you find that no such violation took place, or *if you*

find that the actions which may have injured Plaintiff took place prior to December 23, 1964, you have no damages." (Tr.II 4314) (Emphasis supplied.)

"Since Plaintiff is claiming as damages the entire loss of his business you must find that the loss was due to acts of the Defendant which occurred after December 23, 1964. If you find that no act of Defendant occurring after December 23, 1964 was a cause of the loss of Plaintiff's business or a part thereof, then Plaintiff *is not* entitled to recover in this action." (Tr.II 4319) (Emphasis supplied.)

On November 22, 1972, the jury returned a verdict in favor of defendant Shell. (R. 1302, 1192) On September 11, 1973, the District Court entered an Order and Final Judgment pursuant to Fed. R. Civ. P. 54(b). (R. 1304)

Proceedings In The Court Of Appeals

On October 10, 1973, Hanson filed a notice of appeal. (R. 1226) On September 3, 1976, the United States Court of Appeals for the Ninth Circuit rendered its Opinion (App. A), holding that the jury instruction was erroneous because of *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 339-40 (1971), but affirming the District Court having concluded that

"Nevertheless, the error was harmless." (App. A p. xix)

The decision of the Court of Appeals must be read very carefully to realize that it has in effect

overruled this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971). This is so because the Court of Appeals commenced its discussion of this point with a correct statement of the *Zenith* rule.

"*Zenith* stands for the proposition that a plaintiff may recover for acts violative of the antitrust laws commited prior to the statute of limitations date, but that he may only recover those damages for such acts which accrued and became ascertainable within the period of the statute. *See* 401 U.S. at 338-42. Thus, the trial court's instruction that the jury had to find an overt illegal act within the period of the statute was in error; Hanson could have recovered damages accruing to him after December 23, 1964, if those damages were not ascertainable before that date and were caused by illegal conduct occurring entirely before that date." (App. A. p. xix)

However, the Court of Appeals then concluded that:

"Nevertheless, the error was harmless." (App. A p. xix)

Following this statement, the Court of Appeals sets forth in three paragraphs and a footnote its reasons for concluding that the error was harmless. As shown by the opinion, the Court of Appeals' conclusion that the error was harmless was the result of two tragic errors:

1. The Court of Appeals usurped the power of the jury and reviewed *de novo* the evidence of liability and the evidence of damage without ever giving Hanson the benefit of all favorable inferences; and

2. The Court of Appeals concluded that the *Zenith* rule was either wrong or unfair.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONSTITUTES AN EVASION OF CONTROLLING DECISIONS BY THIS COURT.

In the present case Hanson's evidence established that in the period between 1960 and 1962, Shell and Standard, as a result of a series of meetings and discussions, adopted a pricing policy designed to foster a series of price wars which would curtail the growth and ultimately cause the destruction of independent gasoline sellers. This was a continuing conspiracy but one which, once the policies and procedures were established, was substantially self executing. Hanson suffered under this war of attrition until July 1966, when he was forced to close out his business. Hanson's future damage claim was predicated on this Court's rule in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (the value of the business assets less salvage value on termination) or, alternatively, loss of future profits. In both the first and second trials the District Court held that because of Hanson's past profit picture any claim for loss of future profits was too speculative.

In so ruling the District Court placed this case squarely within the *Zenith* rule, to wit: it was not until July, 1966, that Hanson could recover damages for the destruction of his business based on the value of his assets less what was salvaged on liquidation.

Hanson was thus placed in the following position: His conspiracy evidence was concentrated in the period prior to December 23, 1964, but his future damage could not be ascertained until after July, 1966.

The Court of Appeals acknowledged that the District Court's instruction was an improper statement of the *Zenith* rule but (1) usurped the function of the jury in reviewing the evidence without giving Hanson the benefit of all favorable inferences and (2) concluded that it was wrong to allow Hanson to recover damages accruing in July, 1966 for the destruction of his business. In so doing the decision below ignored the mandate of this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962) that ". . . the jury should be allowed to determine whether respondents' conduct materially contributed to the failure [of plaintiff's business] . . ." and the mandate of this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971) that "[i]n antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted."

A. The decision below constitutes a complete usurpation of Hanson's right to a trial by jury as guaranteed by this Court's Opinion in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

While holding that the jury instruction of the District Court was harmless error, the Court of Appeals, in three paragraphs, summarized its own view of Hanson's evidence of illegal acts and damages. In reviewing the facts the Court of Appeals was in effect ruling that the District Court should have granted a directed verdict for defendant Shell. Yet the District Court, which heard the evidence, did not feel it could grant a directed verdict or judgment notwithstanding the verdict. Nor did the Court of Appeals even attempt to give Hanson the benefit of all favorable inferences.

In reviewing the evidence of illegal acts the Court of Appeals said:

> "Hanson alleged, and the evidence showed, that Shell's conduct, and its relationship with Standard, were constant throughout the early 1960's, and until Hanson's business demise in 1966. If Shell were committing illegal acts before the cut-off date, there is no question that it also committed those same acts after that date. The jury heard all of the evidence of both pre-and post-December 23, 1964, conduct, and by failing to find any illegal conduct after that date, it must have also found that there was no illegal conduct before that date. Thus, the instruction was harmless error." (App. A pp. xix-xx)

This statement of the evidence was vigorously contested by Hanson at the trial. Contrary to the "findings" of the Court of Appeals, the conduct of Shell and Standard was not constant during the period before and after December, 1964.

Hanson's evidence showed that in the latter part of the 1950's Shell became concerned over its loss of market share in Southern California and Arizona to the "independents, private brands and cut rate marketers". (PX 13, 14, 15) Shell concluded that in order to control the growth of the independents and regain its market share it should adopt a new pricing policy.

(1) reduce the differential between regular gasoline and premium gasoline;

(2) competitively price close to the prices of the independents; and

(3) reduce the "normal" dealer tank margin prices.

Shell was to announce this price policy "officially on May 17, 1961". (PX 14) Hanson also presented evidence to show that such a price policy would be too costly to Shell without the cooperation of the industry leader Standard.

Evidence of Standard's conspiratorial cooperation consisted of documents showing that Standard was internally considering the same pricing system prior to Shell's "official" announcement of May 17, 1961, even though this system would be costly to Standard. (PX 154, 158; Tr.II 485-86) Hanson also presented evidence that the Standard and Shell marketing executives in charge of this new pricing policy met several times at trade association meetings and at each other's

offices (Tr.II 203, 205-7, 505, 519, 538) and further showed that one of the many subjects discussed was the increasing market share of the independents. (Tr.II 221-22) Finally, Hanson showed that the result of Standard's and Shell's pricing policies, once adopted in concert, was to force the independent marketers and the retail Shell and Standard operators (almost all of whom were individual owner operators) to engage in vicious price wars which caused a steady loss of income and volume to Hanson.

It is important to note that most, if not all, of the overt acts of Shell and Standard occurred prior to December 23, 1964. Contrary to the findings of the Court of Appeals, the jury could have reasonably found that the relationship of Shell and Standard was not "constant", but on the contrary, that all of their illegal overt acts occurred prior to December 23, 1964.

Not content with a *de novo* review of the evidence of illegal acts, the Court of Appeals also usurped Hanson's right to trial by jury on the question of damage.

The Court said:

> "Second, even under the *Zenith* rule, Hanson would have been limited to recovering damages which he suffered after December 23, 1964. The evidence concerning the history of Hanson's business fortunes shows that as early as 1962, Hanson was trying to get out of the business but was unable to find anyone willing to buy him out at any price. His losses were substantial throughout the following years. The only reasonable conclusion that can be drawn is that the value of Hanson's business in December of 1964 was no greater than its value in 1966 when he closed up shop. Thus, whatever damage Shell might have done to Hanson's business as a result of pre-December 23, 1964, conduct had accrued to Hanson before that date, and he may not recover those damages under the *Zenith* rule.
>
> "It cannot be said that in the year and a half between December 23, 1964, and the time when Hanson closed his business Shell's earlier conduct cost him lost profits which was damage not accruing until after the crucial date. Hanson's evidence shows that in the entire fourteen-year history of his business, there was not one year in which he showed a profit, and in only three years did he make enough to cover even part of the value of his own time and services. The evidence does not support the notion that Shell's conspiracy with Standard, which Hanson alleges began in 1961, caused him to lose profits in the last year and a half of a business which never made a profit in its entire history dating back to 1952. Hanson's losses were no greater after the alleged conspiracy began than before." (App. A pp. xx-xxi)

This is a totally one-sided view of the evidence. It is true that in 1962 and thereafter Hanson tried to sell his business. But, there was no evidence that the business was worthless or that he could not have sold it for "any price". Even $10 or $1,000 is some price. On the contrary, Hanson put in evidence from which the jury might have concluded that his land and buildings were extremely valuable assets. (PX II 102-119H) This evidence shows that in 1962 Hanson had an invested cost of $275,000 in 17 stations.

The Court of Appeals further "found" that Hanson had not made any money in his business and "there was not one year in which he showed a profit"—presumably relying on the tax returns. (SX II 56 A-F, 62) In fact, the tax returns show that Hanson made a taxable profit in 1958, 1959 and 1960 (SX II 55), that from 1952 to 1957 his taxable losses were only $19,465 and that this was a period in which he took substantial depreciation deductions and acquired nine additional service stations. (SX II 56 A-F, 62) A jury could have found that the early period, despite tax losses, was a period of growth and investment in which substantial assets were acquired by Hanson. As this Court has said it is for the jury to "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

When the Court of Appeals took upon itself the power to evaluate the evidence of illegal acts and damage it established a dangerous precedent which is contrary to the sound antitrust policy established by this Court.

Rulings of this Court, with respect to the purpose and role of the jury and with respect to the role of the appellate courts of review, forcefully indicate that the Court of Appeals usurped the jury's province as trier of fact by refusing to remand this cause for a new trial.

Jury instructions which withdraw from the jury's consideration material evidence have, as a matter of

sound historical policy, required a new trial and not review *de novo* by the appellate court. The crucial role and exclusive province of the jury as a trier of fact is well settled and grounded in roots of ancient origin. This Court acknowledged Blackstone's characterization of the jury as "the most transcendent privilege which any subject can enjoy", and stated that the "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935). In accordance with this policy, this Court has held that a charge to the jury which is misleading in that it withdraws from the jury's attention the controlling impact of material evidence, requires a reversal. *Hall v. Weare*, 92 U.S. 500 (1875); *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827).

The application of these principles to private damage suits under the antitrust laws is an essential part of the Congressional plan for making competition rather than monopoly the rule of trade. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959).

On more than one occasion this Court has stressed the importance of a jury trial in antitrust cases.

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and

> subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962).

See also *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 702-703 (1969), and *United States v. Diebold, Inc.,* 369 U.S. 654 (1962).

In *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969), Justice White stated that "[t]he authority of an appellate court when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence."

In *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962), plaintiff charged that defendants, attempted and conspired to monopolize trade and commerce in vanadium, and that, as a proximate consequence of the defendants' practices, plaintiff was eliminated from the business of production and sale of vanadium. Trial was had before a jury and a verdict was returned for defendants. Plaintiff appealed, asserting error as a result of the trial court's exclusion of certain evidence and of certain jury instructions which had the effect of restricting the impact of the evidence before the jury. The

Court of Appeals for the Ninth Circuit held that there was insufficient evidence to justify a jury finding that defendants' illegal acts were in fact the cause of plaintiff's business failure and that a directed verdict for defendants should have been granted. The Ninth Circuit also stated that in reaching its conclusion, it had considered not only all the evidence admitted by the trial judge, but also all the evidence offered by plaintiffs. Nevertheless, this Court reversed and remanded the cause to the District Court, noting that ". . . the Court of Appeals either overlooked or interpreted into insignificance . . ." evidence adduced at trial.

> "Undoubtedly, all of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which *'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'* Tennant v. Peoria & P.U.R. Co., 321 US 29, 35, 88 L ed 520, 525, 64 S Ct 409, 15 NCCA NS 647.
>
> ". . . But the evidence relied up by the court can just as reasonably be read in a manner favorable to Continental [plaintiff] and it appears that the court may have misapprehended significant parts of this record. *In any event, the interpretation and significance of this evidence were for the jury."* 370 U.S. 690, 700-01. (Emphasis supplied.)

This is not to say that a Court of Appeals has no power to review evidence to determine whether an admitted error was prejudicial. But that power must be exercised with circumspection.

The Court of Appeals for the Ninth Circuit should have reviewed all of the relevant evidence advanced by Hanson in the light most favorable to him and afforded him the benefit of all inferences fairly supported by it. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), as in this case, plaintiff's conspiracy claims were tried before a jury, and a verdict was returned for defendants. As in this case, on appeal, the Court of Appeals for the Ninth Circuit held that there was insufficient evidence to justify a jury finding that defendants' illegal acts were in fact the cause of plaintiff's failure in business and that a verdict for defendants should have been directed. This Court reversed and remanded the cause to the District Court for a new trial.

> "*The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.* From our examination of the rather extensive record, we have concluded that the Court of Appeals departed from this rule and erred in holding that there was insufficient evidence to support a finding that respondents' conduct in fact caused injury to Continental's business." 370 U.S. 690, 696-97. (Emphasis supplied.)

By holding that the erroneous jury instruction was "harmless" even though it effectively withdrew from the jury's consideration evidence of pre-December 23, 1964 acts, the Court of Appeals was in essence holding that a directed verdict for Shell was proper. But, the

District Court, which heard the evidence, had already refused to direct a verdict for defendant Shell. *Continental Ore* teaches that Hanson was entitled to a review of the pre-December 23, 1964, evidence which afforded him the benefit of all favorable inferences. Hanson submits that the review of the pre-December 23, 1964, evidence in the decision below failed to acknowledge this standard and the conclusions regarding this evidence were unwarranted.

B. The decision below will seriously undermine the authority of this Court's opinion in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).

The decision below, if unreviewed, will create a precedent for avoiding this Court's pronouncement in *Zenith* regarding the statute of limitations and the accrual of future antitrust damage claims.

In footnote 9 to its opinion (App. A p. xxi), the Court of Appeals correctly noted that Hanson had argued "that the full amount of his damages over the entire life of the conspiracy were not ascertainable until he went out of business. . . ." This argument was "rejected out of hand" by the Court of Appeals with the statement:

> "What this argument implies is that efficient and hard-working independent dealers who make a profit despite illegal conspiracies directed against them have no remedy, but incompetents who are forced out of business can recover, trebled, all losses ever sustained." (App. A p. xxi).

In this statement the Court of Appeals reveals its misunderstanding of, or hostility to, the rule of this Court as expressed in *Zenith*.

As this Court has noted, a plaintiff who suffers damages by reason of a continuing conspiracy is entitled to recover not only those damages he sustained within the limitations period, but also all provable damages which will flow in the future from the acts of the conspirators. To recover for these damages plaintiff must sue within four years of the date the cause of action accrues to him. However, *Zenith* makes it clear that if the future damages are unrecoverable because the fact of their accrual is speculative, the cause of action for future damages does not accrue until the damages occur and are provable.

In holding that an antitrust plaintiff can recover future damages resulting from conspiratorial conduct which occurred prior to the statute of limitations period this Court stated:

> " . . . [I]f a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action. On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. . . .

> *". . . [R]efusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted."* 401 U.S. 321, 339. (Emphasis supplied.)

The award of damages for the value of a business which has been forced out of business by antitrust violations constitutes a recognized alternative to a claim for lost future profits. *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969). Moreover, the First Circuit in *Farmington*, recognized that the appropriate point at which to measure going concern value is the last day at which the destroyed business was a going concern.[2]

Despite the impact *Zenith* has had on clarifying the extent of and point in time at which damages for the destruction of a business because of pre-limitations period conspiratorial conduct are recoverable, the Court of Appeals nevertheless held that *Zenith*

[2]Commentators have recognized that the rule "that the value of the property taken or destroyed must be determined as of the time of the taking" has been applied uniformly in eminent domain, tax valuation and admiralty collision cases and its application to actions involving the destruction of business by antitrust violations has been urged. E. Timberlake, "Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under The Antitrust Laws", 30 Geo. Wash. L. Rev. 231, 280 (1961).

did not entitle Hanson to the recovery of any damages:

> ". . . [W]hatever damages Shell might have done to Hanson's business as a result of the pre-December 23, 1964, conduct had accrued to Hanson before that date, and he may not recover those damages under the *Zenith* rule." (App. A p. xx)

Hanson submits that in accordance with the *Zenith* test the *full* amount of his damages could not be ascertained until he actually was forced out of business. *Zenith* teaches that where lost future profits (or any future damages) are speculative, no cause of action accrues until they become ascertainable. An award for the value of a destroyed business constitutes a recognized alternative for a claim of future lost profits. *Zenith* makes it clear that a plaintiff may recover the value of a business destroyed by pre-limitations conspiratorial conduct because that value remains speculative until the business has been sold or abandoned. The Court of Appeals in the decision below failed to distinguish between damages suffered by Hanson on a daily basis with respect to his sale of gasoline and related products, and the injury to the value of his business assets which accrued when the business was finally destroyed. Hard working independent dealers who make a profit despite illegal conspiracies do have a remedy for lost profits as well as all other damages either suffered within or speculative until the onset of the limitations period. So too do hard working independents against whom the

impact of the conspiracy is so great that they operate at a loss and eventually suffer destruction of their business.

When the Court of Appeals predicated its conclusion that the instruction, which effectively withdrew from the jury's consideration evidence of Shell's pre-December 23, 1964 conspiratorial conduct, was harmless, it misinterpreted the mandate of this Court. Hanson urges that the prejudice which resulted warrants a new trial with instructions to the jury which do not contradict the central holding of *Zenith*.

When the Court of Appeals rejected Hanson's argument "out of hand" it was in effect refusing to follow this Court's direction in *Zenith*. The decision below has created a dangerous anomoly in the antitrust laws which will substantially weaken the private action "as a bulwark of antitrust enforcement", *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), and is contrary to the policy that the antitrust laws fully "protect the victims of the forbidden practices as well as the public." *Radovich v. National Football League,* 352 U.S. 445 (1957).

II. THE DECISION BELOW IS CONTRARY TO THE LAW PREVAILING IN OTHER CIRCUITS

The rule announced in *Zenith* has received vigorous application in other circuits. In *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.,* 459 F.2d 768 (3rd Cir. 1972), the plaintiff sought damages

for an antitrust conspiracy which forced him to sell his business. The Third Circuit reversed the District Court's findings that the claim was barred by the statute of limitations because the conspiratorial conduct occurred prior to the limitations date in light of this Court's ruling in *Zenith,* and stated:

> "Waterman [plaintiff] could hardly calculate, at least, that portion of its damages relating to the value of the business when it remained speculative until a sufficient time for reasonable attempts to sell the business had expired or the sale of the business had been made. *It was only at the time of resale, when the damages were actually suffered, that the cause of action accrued and the statute of limitations began to run.*" 459 F.2d 768, 770.

In addition to the Third Circuit, the Second and Fifth Circuits have applied *Zenith* vigorously. *Poster Exchange, Inc. v. National Screen Service Corp.,* 456 F.2d 662, 666-68 (5th Cir. 1972), *cert. denied,* 423 U.S. 1054 (1976); *Ansul Co. v. Uniroyal, Inc.,* 448 F.2d 872, 885 (2d Cir. 1971), *cert. denied,* 404 U.S. 1018 (1972).

Without this Court's guidance in a review of the decision below, it will be impossible for the courts to reconcile the conclusion of the Ninth Circuit that the failure to follow *Zenith* in this case was harmless error with the exact opposite conclusion of the Third Circuit in *Continental-Wirt.*

CONCLUSION

The posture of this case is simple. The evidence of illegal acts and damage was, as the District Court held, properly submitted to the jury. The jury was given an erroneous jury instruction which withdrew from its consideration evidence of pre-December 23, 1964 acts. This evidence was at the heart of Hanson's claim and under *Zenith* should have been considered by the jury. The Court of Appeals cannot now sit as a jury and decide this case. Nor can the Court of Appeals overrule *Zenith.* Justice and sound antitrust policy require that the case be sent back for a new trial.

For the foregoing reasons this Court should grant a Writ of Certiorari to review the decision below.

Dated: December 3, 1976.

Respectfully submitted,

John H. Boone,
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Attorneys for Petitioner.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
For The Ninth Circuit

No. 74-1034

C. O. Hanson, *Plaintiff-Appellant,* vs. Shell Oil Company, *Defendant-Appellee.*	

[September 3, 1976]

Appeal from the United States District Court
for the District of Arizona

OPINION

Before: DUNIWAY and WRIGHT, Circuit Judges,
and LUCAS,* District Judge

DUNIWAY, Circuit Judge:

In this action appellant Hanson charged appellee Shell Oil Company and defendants Standard Oil Company of California and Gulf Oil Company with violations of § 7 of the Clayton Act, a vertical restraint of trade and horizontal restraint of trade, both under § 1 of the Sherman Act, and attempt and conspiracy to monopolize under § 2 of the Sherman

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*The Honorable Malcolm M. Lucas, United States District Judge for the Central District of California, sitting by designation.

Act. The trial court granted summary judgment to all defendants based on all acts occurring before December 23, 1964, and to Gulf on the § 7 Clayton Act charge. At trial, directed verdicts were entered for all defendants on all remaining claims except for the horizontal restraint charge under § 1 and the conspiracy charges under § 2 of the Sherman Act against Shell and Standard. The jury returned a verdict on those two charges for Hanson and awarded damages of $363,181.31, which when trebled would exceed $1 million. Defendants Shell and Standard moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The court denied the motions for judgment n.o.v., but granted a new trial on the two issues that had been submitted to the first jury. At the new trial, against Shell alone, the second jury found for the defendants. Hanson now appeals, asserting error in (1) the granting of the motion for a new trial, and (2) granting the directed verdict for Shell on the § 1 vertical restraint claim and the § 2 attempt to monopolize claim. He also attacks the court's instruction to the second jury concerning acts occurring before December 23, 1964, and the rejection of certain evidence. Shell is the only appellee, Hanson's claims against Standard having been settled. We affirm.

I. *Statement of the Facts.*

Hanson moved to Tucson, Arizona, in 1952, having assets of less than $7,000. He invested this money in his first service station under the name of "Hanson's

Direct Service." Over the following ten years he expanded his business to include seventeen service stations along with a distributorship for El Paso Natural Gas products which he acquired in 1958. Throughout the entire period from 1952 to 1964, Hanson's business lost money in all but three years, and in those three years he failed to make enough to equal the $8,000 that he thought was a reasonable value for his managerial services. Thus, Hanson's expansion was financed entirely through credit, much of which was unwilling. Hanson admitted at the first trial that he used money from gasoline sales to acquire new stations rather than to pay his gasoline bills to his suppliers. Thus, by 1964, Hanson had turned his just under $7,000 into seventeen old service stations, one natural gas distributorship, and hundreds of thousands of dollars of debt.

Hanson's business was continually short of cash. By the end of 1964, he owed substantial amounts to over thirty creditors, and he had exhausted his credit. Hanson could buy gasoline only on a cash and carry basis. This, the relatively shoddy condition of his stations, and his difficulty in keeping station managers, combined to keep Hanson's monthly gasoline sales average around 10,000 gallons per station, while other independent dealers in Tucson were averaging four to five times that amount. Testimony at the first trial indicated that with such a low sales volume a dealer could not continue to operate indefinitely.

Because of these hopeless conditions, beginning in 1962, Hanson attempted to sell his entire business,

but, not surprisingly, he was unable to find any interested buyers. In July of 1966, Hanson finally closed out his business. Like many another loser in the competitive endeavor, he decided to try the antitrust laws as a means of shifting his losses to someone else. He brought the present action against Shell, Standard, and Gulf on December 23, 1968, two and one-half years later.

Hanson claims that he was the victim of an endless series of retail gasoline price wars which plagued the Tucson market from 1958 to well after Hanson shut down his business in 1966. He claims that the cause of these price wars was the policy of Shell and Standard Oil, by price gouging, to run private brand and independent dealers out of the market. He points specifically to a change in Shell's pricing policy adopted in 1961 whereby Shell began a program of more vigorous price competition designed to regain the market share in the Western Region which Shell had lost in the previous six years. Hanson claims that in furtherance of this plan to seize market strength from the small private brand and independent dealers, Shell threatened and coerced its retail dealers to conform to Shell's suggested predatory prices, and also enlisted Standard's cooperation so that their efforts could be directed solely at the independents rather than at each other. The complaint alleged that because of the vertical restraints placed on the Shell dealers and the horizontal arrangement with Standard, Shell violated §§ 1 and 2 of the Sherman Act and thereby caused Hanson to lose his business.

II. *The Directed Verdict on the § 1 Vertical Restraint Claim was Proper.*

Hanson claims that Shell violated § 1 of the Sherman Act by fixing the retail price of gasoline sold by franchised Shell dealers. This vertical price fixing was supposedly accomplished through the use of company-owned stations which could put competitive pressure on franchised dealers, through the use or non-use of "dealer assistance," and through threats of refusals to deal such as not renewing dealer leases. After hearing all of the evidence, the trial court directed a verdict for Shell on this claim.

In the absence of fair-trade statutes, vertical resale price maintenance agreements are *per se* violations of § 1. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 1911, 220 U.S. 373, 399-400. This is true even though the agreement be only an implied one. *F.T.C. v. Beech-Nut Packing Co.,* 1922, 257 U.S. 441, 453. If the agreement between the supplier and his buyer is reached because of coercive conduct toward non-complying buyers, such as refusals to deal, a violation is also made out. *Simpson v. Union Oil Co.,* 1964, 377 U.S. 13, 17. The refusal to deal which gave rise to the vertical agreement in *Simpson* was Union Oil's failure to renew a dealer's lease because of his lack of compliance with the company's suggested resale prices. Thus, if the evidence presented at the first trial, taken in the light most favorable to Hanson, could support a finding that there was a coerced agreement between Shell and its retail dealers, the directed verdict must

be reversed. *Cornwell Quality Tools v. C.T.S. Co.*, 9 Cir., 1971, 446 F.2d 825, 830.

Hanson points to three different items of evidence which he claims to be sufficient to require that the § 1 vertical restraint claim be submitted to the jury. First, there was evidence that during the early 1960's Shell maintained one or two company owned stations in Tucson which would set the retail price at the point the company recommended and thus put pressure on the other Shell dealers to comply. There are a number of reasons why this does not support Hanson's case. Hanson claims that Shell's war against the independents was waged in the Western Region encompassing five states, so that the fact that two company stations were maintained in Tucson, Arizona, is hardly evidence of coercion of Shell dealers throughout the relevant market. Moreover, even if the relevant market were limited to Tucson, two company-owned stations out of the multitude of Shell brand stations that existed in Tucson's eight trade areas would not be evidence of pressure being put on the franchise dealers. Hanson's own witness, a Mr. Wolken, the largest Shell brand franchisee in Tucson, testified that to his knowledge there were no company-owned Shell stations in Tucson. Finally, even if such pressure did flow from maintaining company-owned stations, there is no legal or economic reason for finding the use of such market pressures to be violative of § 1.

Hanson next points to Shell's use of "dealer assistance," a pricing system whereby Shell lowered its

"tank wagon price" (wholesale dealer price) to dealers whenever it recommended that the dealers reduce their retail prices.[1] Hanson contends that by reducing the tank wagon price whenever it recommended a lower retail price, Shell put pressure on the individual dealer to follow the recommendation, because every other Shell station would be priced below him if he did not. This argument has no merit. The uncontroverted evidence shows that dealer assistance was provided by Shell in a given area to individual dealers who asked for it. Dealers asked when they felt forced to lower their retail prices in order to meet local competition but felt financially unable to absorb the entire price reduction out of their margin. Thus, they asked Shell to give them dealer assistance so that they could meet competition without extreme financial sacrifice. The program was not initiated by Shell to force dealers to fix prices, but was initiated by dealers to enable them to stay competitive.

If Shell conditioned "dealer assistance" on a dealer's actually reducing his retail price, a more serious look at possible § 1 violations would be warranted. *See Lehrman v. Gulf Oil Corp.*, 5 Cir., 1972, 464 F.2d 26. However, the testimony of Hanson's witness, Mr. Wolken, was that the changes in tank wagon price made by Shell were made for every dealer on request,

[1] For each of the first four cents in recommended retail price reduction, Shell lowered the tank wagon price to its dealers by three-fourths of a cent. Thus, after a four-cent recommended reduction, Shell absorbed three cents. After the first four cents, Shell reduced the tank wagon price on a penny for penny basis absorbing 100% of all recommended price reductions.

whether or not the requesting dealer suggested changes in retail price, and the testimony of another Shell dealer in Tucson, Mr. Mergard, also a witness for Hanson, verified that Shell's policy was that any "dealer assistance" was not predicated on the dealer's retail price. Thus, the "dealer assistance" program could not be construed as an attempt by Shell to regulate its dealers' retail prices.

Finally, Hanson points to the testimony of his witnesses, Messrs. Wolken and Mergard, claiming that it shows that coercive tactics were used by Shell representatives to gain dealer compliance. In fact, the testimony of these two dealers supports Shell, not Hanson. The only part of Wolken's testimony which even arguably supports a claim of coercion involves a bit of fancy questioning by Hanson's attorney. After questioning Wolken on how price conversations with his Shell representative would generally go, Hanson's attorney asked him if Shell had ever threatened to cancel his lease. Wolken responded that in 1962 his Shell representative had threatened to cancel his lease "if I didn't do as I was told." Interestingly, the specific dispute from which the threat arose was never revealed and Hanson's attorney never asked that question. It is only speculation that the threat arose over a price controversy. If Hanson is to claim that this threat was an attempt to regulate retail prices, the connection between the threat and a price dispute must be shown. In addition, even though at the heart of his claim, Hanson was unable to get any other examples of suggestively coercive conduct from the

largest Shell dealer in Tucson who testified to deviating from the suggested price ten percent of the time. The most that can be drawn from Wolken's testimony to support Hanson is that on a single occasion a local company representative warned a single dealer that his lease might be cancelled over a dispute about an unknown topic. This gives Hanson's claim no support.

Mergard's testimony is no more helpful. He testified that on a single occasion his Shell representative told him that they could enter a "period of better cooperation" if he would get Shell products on the shelves, put price signs up, and follow recommended prices. There was no testimony as to what constituted "bad cooperation" on Shell's part, whether Mergard felt pressured into following the recommended retail price, or whether this was an isolated incident. On cross-examination, however, Mergard said that despite his ignoring the recommended retail price for over a year before his lease renewal date Shell renewed his lease, and that for two years he did not regularly follow the price recommendations. Hanson's reliance on Mergard's testimony that he felt that his "dealer assistance" was often delayed is misplaced as well.[2] Mergard testified that the reason for the delay was Shell's business judgment that the particular trade area did not qualify for such assistance and not an attempt to pressure dealers into price compliance.

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[2]It is curious that Hanson should introduce evidence suggesting Shell often withheld dealer assistance while accusing Shell of using it as a means of predatory price gouging.

Both witnesses testified that they were free to post their own prices based on their own business judgment, and that they did in fact always follow that judgment.[3] The directed verdict was proper.[4]

III. *The Directed Verdict on the § 2 Attempt to Monopolize Claim was Proper.*

Hanson's claim is that Shell's pricing policy was an illegal attempt to monopolize prohibited by § 2 of the Sherman Act. In his brief, however, Hanson fails to point to any evidence in the record, and fails to provide any legal analysis, to support his claim other than to argue that the grounds upon which the trial judge based his directed verdict were improper. Even more extraordinary, however, is Hanson's failure to reveal what part of interstate commerce he believes that Shell was attempting to monopolize. Was it the wholesale or the retail gasoline market? If the wholesale market is the focus of his charge, then a directed verdict was proper because no relationship between Hanson's business failure in the retail market and Shell's alleged attempt to monopolize the

[3]Even had Hanson presented sufficient evidence upon which a jury could have found that Shell attempted to coerce dealers into following the recommended price, his failure to show that any dealers in fact succumbed to this pressure is an additional basis for a directed verdict since without such a showing no connection between Shell's conduct and Hanson's retail business difficulties could be found.

[4]*Gray v. Shell Oil Co.*, 9 Cir., 1972, 469 F.2d 742, makes it clear that a supplier may suggest retail prices to its dealers and use "persuasion" to get them to adopt the suggested prices. No violation is made out unless plaintiff can show that the supplier's conduct rose to the level of coercion sufficient to deprive the dealers of their free choice. Hanson made no such showing.

wholesale market was shown. If the attempt was to monopolize the retail market, Hanson's case hinges on his ability to show that Shell attempted to control retail prices, a fact which, as we have already noted, Hanson was unable to prove.

Beyond these threshold failures, Hanson also failed to demonstrate anything which could support a finding that one of the essential elements of an illegal § 2 attempt was present. An "attempt to monopolize" requires that acts be performed with the specific intent to monopolize. *See, e.g., American Tobacco Co. v. United States,* 1946, 328 U.S. 781, 809; *Swift & Co. v. United States,* 1905, 196 U.S. 375, 396; *Cornwell Quality Tools Co. v. C.T.S. Co., supra,* 446 F.2d at 832.

Hanson presented no evidence which would suggest that the "specific intent" to monopolize existed; he does not even discuss specific intent in his brief. It is true that Shell adopted a new pricing policy in 1961 designed to expand its share of the Western Region market, but this reflects no more than Shell's unwillingness to watch its market share continue to erode as it had done since 1955. Before the new pricing policy could get Hanson to the jury as a possible attempt to monopolize, Hanson had to establish that the new policy represented "predatory pricing" designed to drive competitors out of the market and establish monopoly benefits for Shell. This he has made no attempt to do.

To demonstrate predation, Hanson had to show that the prices charged by Shell were such that Shell was foregoing present profits in order to create a market

position in which it could charge enough to obtain supranormal profits and recoup its present losses. This could be shown by evidence that Shell was selling its gasoline at below marginal cost or, because marginal cost is often impossible to ascertain, below average variable cost.[5] *See International Air Industries, Inc. v. American Excelsior Co.*, 5 Cir., 1975, 517 F.2d 714, 723-24; Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 1975, 88 Harv. L. Rev. 697, 703-18. Hanson made no effort to prove that the prices Shell was charging at either the wholesale or the retail level were below marginal or average variable costs, and for all that appears Shell's new pricing policies were nothing more than an attempt to gain a larger share of the market because of its stronger competitive position. If its prices were above its costs, and nevertheless Shell's policies did drive Hanson out of business, this can only be because Hanson was so inefficient that at prices at which Shell could make a reasonable profit he could not. The antitrust laws were not intended, and may not be used, to require businesses to price their prod-

[5]An alternative possibility might be a showing that the defendant charged a price which, although above marginal or average variable cost, was below its short run profit-maximizing price and that barriers to entry were great enough to prevent other entry before the predator could reap the benefits of his oligopolistic or monopolistic market position. *See International Air Industries, Inc. v. American Excelsior Co.*, 5 Cir. 1975, 517 F.2d 714, 724. There is some question, however, whether pricing below a profit maximizing point which is still above marginal and average variable costs should be considered predatory; it only discourages inefficient new entrants who must have higher prices to survive. *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 704-09.

ucts at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. The Sherman Act is not a subsidy for inefficiency. Hanson's failure to show that Shell's prices were below its marginal or average variable costs was a failure as a matter of law to present a prima facie case under § 2.[6]

IV. *The Granting of a New Trial on the § 1 Horizontal Restraint and § 2 Conspiracy Claims was Proper.*

Hanson also charged that Shell and Standard entered into an agreement to avoid competition between themselves and to drive the independent dealers out of business, and that this conduct was a violation of §§ 1 and 2 of the Sherman Act. Although at the first trial the jury returned a verdict for Hanson on these claims in the amount of $363,181.31, the trial court concluded that the verdict was against the weight of the evidence, that the damages were excessive, and that his instructions on the damages issue were improper. On these grounds, the court ordered a new trial on both issues. Hanson now argues that this order was error.

The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if

[6]While proof of pricing below marginal or average variable cost is prerequisite to a prima facie showing of an attempt to monopolize, such a showing, if made, would not show a *per se* violation. There may be non-predatory and acceptable business reasons for a firm engaging in such pricing. Plaintiff's showing of below-cost pricing merely clears the first hurdle and raises the question of justification.

"the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice." *Moist Cold Refrigerator Co. v. Lou Johnson Co.,* 9 Cir., 1957, 249 F.2d 246, 256. A new trial may also be granted when in his judgment the trial judge finds that the "amount of compensation awarded is excessive." *Murphy v. United States District Court,* 9 Cir., 1944, 145 F.2d 1018, 1020. Absent a showing that the trial court abused its discretion, the order granting a new trial will not be reversed on appeal. *Oswald v. Cruz,* 9 Cir., 1961, 289 F.2d 488. Furthermore, reversal is unwarranted unless the trial court abused its discretion with respect to each ground upon which it based the order; if any ground is reasonable, the order must be affirmed. *Nuttall v. Reading Co.,* 3 Cir., 1956, 235 F.2d 546, 548. Our review of the record convinces us that the trial court did not abuse its discretion in ordering a new trial on any of the stated grounds.

A. *The Verdict was Against the Weight of the Evidence.*

Hanson's argument hinges on some documented meetings between Standard and Shell executives at an oil trade association meeting and at other times in San Francisco where their offices are located. When an illegal conspiracy or agreement to restrain trade is charged, there must be evidence from which actual agreement or mutual consent can be found or inferred. *Esco Corp. v. United States,* 9 Cir., 1965, 340 F.2d 1000, 1007-08. Thus, evidence of meetings

alone is not sufficient; there must also be evidence sufficient to permit the jury to infer illegal agreement. We agree with the trial judge that the evidence that Hanson offered to show such agreement was so lacking that the verdict against Shell was against the weight of the evidence.

Hanson attempted to show agreement by introducing evidence of parallel pricing behavior on the part of the two oil companies and the willingness of the companies to share price information. His evidence was weak. This court has noted that:

> Similarity of prices in the sale of standardized products . . . will not alone make out a prima facie case of collusive price fixing in violation of the Sherman Act, the reason being that competition will ordinarily cause one producer to charge about the same price that is charged by any other. *Independent Iron Works, Inc. v. U. S. Steel Corp.,* 9 Cir., 1963, 322 F.2d 656, 665.

In fact, the massive volume of evidence comparing prices of various dealers and companies in the Western Region and in Tucson showed that Shell's retail prices were paralleled by the prices of the other majors and of independent dealers as frequently as, if not more frequently than, they were by Standard. While wholesale price data were much less complete, there was nothing offered by Hanson to show that Standard and Shell moved with any more consistency with one another than with any other supplier.

Likewise, Hanson's claim that the willingness of the two companies to share wholesale price information demonstrated an agreement is also weak. Unlike

United States v. Container Corp. of America, 1969, 393 U.S. 333, this case does not involve companies exchanging secret price information for the purpose of price stabilization. Here, Shell and Standard were willing to seek and to reveal wholesale price information for the purpose of reducing their prices to retail dealers requesting "dealer assistance" when such aid was appropriate. The information was not secret and was available to anyone requesting it. The goal of either company was not shown to be price stabilization, but rather price reductions in order to help local dealers faced with severe competition. Such exchange of information does not rise to the level of an illegal conspiracy, *see Gray v. Shell Oil Co.,* 9 Cir., 1972, 469 F.2d 742, 746-47, and the trial court did not abuse its discretion in finding that this, coupled with the other scant evidence of illegal agreement, was outweighed by the massive amounts of evidence introduced to show that Shell and Standard were active competitors, not conspirators.

B. *The Damage Award was Excessive.*

The trial court also found that because the evidence was weak in showing that Shell's pricing policy was a proximate cause of Hanson's financial difficulties, and because the evidence as to Hanson's actual damages was misleading and confusing, a new trial was necessary. Again, we cannot say that this was an abuse of discretion.

Hanson argues that Shell's predatory pricing was the proximate cause of his going out of business, and

that Shell should be liable for the full value of the business. Hanson did not, however, produce evidence tying Shell's conduct, or even the price wars that dominated the Tucson market,[7] to his business failure. In fact, the evidence, considered as a whole, points to the opposite conclusion.

Long before Shell's new pricing policy, Hanson was pumping quantities of gasoline far below those necessary to survive. His stations were old and dilapidated. He imposed two middlemen between the supplier and dealer, thus having trouble keeping his dealers because the margin that he could offer was too small. He had inadequate supplies of gasoline in a town flooded with it because he had gotten over his head in debts and lost all of his credit. In short, almost every piece of evidence points to the conclusion that Hanson went broke because of his incompetent and inefficient management. Of all the independent dealers in Tucson during the period in issue, only Hanson was forced out of business, and one such dealer subsequently took over three of Hanson's stations and operated them at a substantial profit despite Shell's alleged war of genocide on the independents. Apparently, only Hanson was affected by the war. The market share of the other independents in Tucson rose from 19.5% in 1962 to 30.4% in 1967, while Shell's market share fell from 10.2% to 9% over the same period. Thus, the jury's finding that

[7]Apparently Hanson ties Shell's alleged pricing policy to his problems by claiming that it was this illegal activity which caused the price wars. The testimony, however, is that it was the independents who started the wars.

Shell's policies were the proximate cause of Hanson's troubles was clearly against the weight of the evidence.[8]

In addition, the evidence presented as to the value of Hanson's business was confusing at best and incredible at worst. Hanson admitted that the profit and loss statement for December 1, 1961, to November 30, 1962, upon which he relied heavily, did not reflect the complete profit picture of the business as required in *Wolf v. National Lead Co.,* 9 Cir., 1955, 225 F.2d 427, 430-31. Likewise, Hanson's testimony that his business was worth $1.00 for every gallon of gasoline sold per month, even if admissible, was mere assertion, and in light of his long term profit picture was, to say the least, unreasonable. The trial court was well within its discretion in granting a new trial based on its belief that the jury was confused by the damage evidence and returned an excessive verdict.

V. *The Statute of Limitations Issue.*

At the second trial on the claimed Shell-Standard conspiracy, the trial judge instructed the jury:

> You have heard throughout the trial the references to the date December 23, 1964. That date is important to this lawsuit because Plaintiff may recover damages only if you find *that the Defendant committed overt acts in violation of the antitrust laws after December 23, 1964,* and if those acts injured the Plaintiff. I have permitted you to hear evidence as to other matters before December 23, 1964, but such evidence was admitted only as background material which the Plaintiff was permitted to produce for the purpose of attempting to show the origins of alleged conduct which Plaintiff charges occurred after December 23, 1964. (emphasis added)

[8]In fact, Hanson's showing was so insubstantial that the trial court's only possible error was its failure to direct a verdict for Shell on all counts at the close of the evidence.

Hanson claims that this instruction was in error because of the Supreme Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 1971, 401 U.S. 321, 339-40. We agree that the instruction was a misstatement of the *Zenith* rule, but the error was harmless.

Zenith stands for the proposition that a plaintiff may recover for acts violative of the antitrust laws committed prior to the statute of limitations date, but that he may only recover those damages for such acts which accrued and became ascertainable within the period of the statute. *See* 401 U.S. at 338-42. Thus, the trial court's instruction that the jury had to find an overt illegal act within the period of the statute was in error; Hanson could have recovered damages accruing to him after December 23, 1964, if those damages were not ascertainable before that date and were caused by illegal conduct occurring entirely before that date. Nevertheless, the error was harmless.

First, the trial court did admit all evidence of Shell's pre-December 23, 1964, conduct which Hanson thought was relevant to his case. Hanson alleged, and the evidence showed, that Shell's conduct, and its relationship with Standard, were constant throughout the early 1960's, and until Hanson's business

demise in 1966. If Shell were committing illegal acts before the cut-off date, there is no question that it also committed those same acts after that date. The jury heard all of the evidence of both pre- and post-December 23, 1964, conduct, and by failing to find any illegal conduct after that date, it must have also found that there was no illegal conduct before that date. Thus, the instruction was harmless error.

Second, even under the *Zenith* rule, Hanson would have been limited to recovering damages which he suffered after December 23, 1964. The evidence concerning the history of Hanson's business fortunes shows that as early as 1962, Hanson was trying to get out of the business but was unable to find anyone willing to buy him out at any price. His losses were substantial throughout the following years. The only reasonable conclusion that can be drawn is that the value of Hanson's business in December of 1964 was no greater than its value in 1966 when he closed up shop. Thus, whatever damage Shell might have done to Hanson's business as a result of pre-December 23, 1964, conduct had accrued to Hanson before that date, and he may not recover those damages under the *Zenith* rule.

It cannot be said that in the year and a half between December 23, 1964, and the time when Hanson closed his business Shell's earlier conduct cost him lost profits which was damage not accruing until after the crucial date. Hanson's evidence shows that in the entire fourteen-year history of his business, there was not one year in which he showed a profit,

and in only three years did he make enough to cover even part of the value of his own time and services. The evidence does not support the notion that Shell's conspiracy with Standard, which Hanson alleges began in 1961, caused him to lose profits in the last year and a half of a business which never made a profit in its entire history dating back to 1952. Hanson's losses were no greater after the alleged conspiracy began than before.[9]

VI. *The Court did not Err in Excluding the Lundberg Surveys.*

The court excluded from evidence the Lundberg Surveys, periodic price listings of the retail prices of gasoline in a given area at a given time. Hanson argues that the survey was admissible under the exception to the hearsay rule permitting market reports and price listings relied on in the industry to be admitted under the assumption that they are reliable. *See Commonwealth of Virginia v. State of West Virginia,* 1951, 238 U.S. 202, 212. However, the trial judge had sound grounds upon which to exclude the surveys from evidence.

The trial court may reject unreliable price information. *Herzog v. United States,* 9 Cir., 1955, 226 F.2d 561, 564. In this case there is ample evidence

[9]Hanson's argument that the full amount of his damages over the entire life of the conspiracy were not ascertainable until he went out of business can be rejected out of hand. What this argument implies is that efficient and hard-working independent dealers who make a profit despite illegal conspiracies directed against them have no remedy, but incompetents who are forced out of business can recover, trebled, all losses ever suffered.

upon which the trial court could base a finding of unreliability. While there is a showing that the survey was relied upon in the industry, the evidence is that it was relied upon only for the purpose of discerning general price trends, and not for the specific day-to-day pump prices upon which Hanson wanted to rely. The trial judge's determination that the day-to-day prices in the survey had not been shown to be reliable was proper grounds for his excluding the evidence.

Hanson also sought to introduce the survey to show that Shell's and Standard's pricing paralleled each other. As we have seen, even if Hanson could establish closely parallel pricing patterns between the two brands, in an industry where prices are likely to be similar, such evidence does little to establish an illegal conspiracy. Thus, exclusion of evidence which would show parallel pricing would be harmless to the plaintiff. Moreover, we have held that the trial court properly directed a verdict in favor of Shell on the issue of vertical retail price maintenance. If Shell did not control the retail price at which its dealers sold gasoline, evidence of the retail price would show nothing material about Shell's behavior. Thus, because of Hanson's failure to show that the suppliers controlled retail prices, excluding evidence of retail prices was also harmless.

VII. *Summary.*

We hold that the trial court properly directed a verdict for Shell on the Sherman Act §1 charge of vertical combination in restraint of trade and §2 charge of attempt to monopolize. We also hold that the trial court acted well within its discretion in granting a new trial on the Sherman Act §1 horizontal combination in restraint of trade and §2 conspiracy to monopolize charges. We further hold that, although the instruction on the statute of limitations during the second trial was in error, the error was harmless. Finally, we hold that the trial court properly refused to admit the Lundberg Survey in evidence.

Affirmed in all respects.

WRIGHT, Circuit Judge, concurring:

I concur, but would prefer to dispose of the appeal on the basis that the plaintiff in this private antitrust action should fail because he has not established the necessary "reasonable probability" of some causal connection between the defendant's wrongful act and some injury to the plaintiff. *Flintkote v. Lysfjord,* 246 F.2d 368, 392 (9th Cir. 1957). *See also Pacific Coast Agricultural Export Ass'n v. Sunkist,* 526 F.2d 1196, 1205-06 (9th Cir. 1975); *Gray v. Shell Oil Co.,* 469 F.2d 742, 749 (9th Cir. 1972); *Siegel v. Chicken Delight, Inc.,* 448 F.2d 43, 52 (9th Cir. 1971).

Appendix B

United States District Court
for the District of Arizona

No. Civ. 69-145 Tuc.—JAW

C. O. Hanson, Plaintiff, vs. Gulf Oil Corporation, Shell Oil Company and Standard Oil Company of California, Defendants.	

[Filed Sept. 11, 1973]

ORDER AND FINAL JUDGMENT PURSUANT TO RULE 54(b), FED. R. CIV. P.

Each and every claim and issue in the above-entitled action presented by the complaint herein against the Shell Oil Company ("Shell") having now been resolved in Shell's favor, and the last outstanding claims and issues having been tried separately to a jury which returned a verdict for Shell on November 22, 1972; and it being expressly determined that there is no just reason for delay and expressly directed that final judgment upon said claims and issues be entered, it is

Ordered, Adjudged and Decreed:

(1) That plaintiff take nothing by his complaint against Shell, and that Shell have and recover its costs of suit in the amount of $12,634.94 as taxed by this Court's Judgment Order of January 5, 1973;

(2) And further, this Court, expressly determining, under Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in entering final judgment in Shell's favor, hereby expressly directs that final judgment dismissing plaintiff's claims against Shell be entered; and the same hereby is entered.

It is so Ordered this 11th day of September, 1973.

James A. Walsh
United States District Judge

Judgment entered.

W. J. Furstenau, Clerk
By: Louise Clelland, Deputy Clerk

September 11, 1973.

Appendix C

Section 1 of the Sherman Act, 26 Stat. 209 (1890) as amended 50 Stat. 693 (1937); 69 Stat. 282 (1955), 88 Stat. 1708 (1974), 15 U.S.C. §1 (1975).

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 26 Stat. 209 (1890) as amended 69 Stat. 282 (1955); 88 Stat. 1708 (1974), 15 U.S.C. §2 (1975).

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15 (1952).

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in con-

troversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law.